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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

RICHARD DASCHBACH, individually and  
on behalf of others similarly  
situated, \*  
Plaintiffs \* 1:22-cv-346-JL  
v. \* June 30, 2023  
ROCKET MORTGAGE, LLC, a Michigan  
limited liability company, \* 11:09 a.m.  
Defendant.  
\* \* \* \* \*

TRANSCRIPT OF DISCOVERY STATUS CONFERENCE  
HELD VIA VIDEOCONFERENCE  
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

Appearances:

For the Plaintiff: Taylor True Smith, Esq.  
Woodrow & Peluso LLC

V. Richards Ward Jr., Esq.  
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For the Defendant: Kyle Tayman, Esq.  
Goodwin Procter LLP

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Official Court Reporter  
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1 P R O C E E D I N G S  
2

3 THE CLERK: Good morning, your Honor.

4 Court is now in session, has before it for  
5 consideration a discovery dispute conference in 22-cv-346-JL,  
6 Richard Daschbach vs. Rocket Mortgage LLC.7 THE COURT: Excuse me, Counsel. I want to get my  
screen straightened out here.

8 Can everybody hear me okay?

9 THE CLERK: Yes.

10 MR. TAYMAN: Yes, your Honor.

11 MR. SMITH: Yes, your Honor.

12 THE COURT: I'm not in the courthouse. I'm in  
13 Washington. I teach a class down here Fridays and Saturdays  
14 this time of year. So I appreciate your flexibility on  
15 scheduling so we can get this resolved.

16 All right. Just give me a second.

17 Okay. I've read your submissions. I think I  
18 understand the issues. I do have some questions, just general  
19 questions that anybody can answer, before I sort of get down to  
20 brass tacks.21 The first thing is just the -- the devices involved.  
22 Is there agreement on the universe of devices that need to  
23 be -- I mean, have there been representations about which  
24 devices were used and is the defendant willing to accept those  
25 or does he want to cast a wider net? What's the story on the

1 device list? Just -- if somebody just lists the devices for me  
2 first, maybe the plaintiff, that are in play here, it would be  
3 helpful.

4 MR. SMITH: Sure, your Honor. It's Mr. Daschbach's  
5 iPad.

6 THE COURT: That's it, just the iPad?

7 MR. SMITH: That's it.

8 THE COURT: Okay. I mean -- and so does defense  
9 want to settle for just the iPad based on that representation  
10 or --

11 MR. TAYMAN: Yeah. So, your Honor, there's an iPad  
12 and there's a cell phone as well.

13 THE COURT: Yeah.

14 MR. TAYMAN: We're looking for whatever devices he  
15 used between September and December of 2021, so if it's just  
16 the iPad and that's the representation, we'll take the iPad.

17 We understand the cell phone is a flip phone and we  
18 said, fine, just tell us it wasn't used to access the Internet  
19 and we don't want to look at that.

20 THE COURT: And that -- was it -- so I guess I'm  
21 asking plaintiff's counsel. The flip phone was not used to  
22 access the Internet?

23 MR. SMITH: No, it's not capable of doing that.

24 THE COURT: Okay. So it's just one device. Okay.  
25 Well, that's helpful. Good.

1                   Question two is has Mr. Daschbach been deposed yet.

2                   MR. SMITH: No, your Honor.

3                   MR. TAYMAN: No.

4                   THE COURT: Okay. Now, what about this issue that  
5 the defense basically already has the ability to basically get  
6 this information through LMB? What about that, Counsel?

7                   MR. TAYMAN: Sure. Glad to speak to that, your  
8 Honor.

9                   That is factually incorrect. That is pure  
10 speculation. Notably, plaintiff pulls that from the LMB  
11 privacy policy. He excerpts out some words that are very  
12 critical there and if you read the policy for yourself, it says  
13 that LMB may collect that information. It does not say that it  
14 does.

15                  The information that LMB has is if a consumer goes  
16 to their website, goes through the entire flow like  
17 Mr. Daschbach did that we know at least two instances and  
18 presses the submit button, only if they press the submit button  
19 will they get that. So if Mr. Daschbach went to the website,  
20 you know, a hundred times before, after all these visits, they  
21 will not know that. They don't track that information at all  
22 in any respect.

23                  In particular, you know, even if they could,  
24 plaintiff suggests that, well, they've given us his IP  
25 addresses and we can use those. So, again, two problems with

1 that.

2 One, LMB does not track user visits who don't submit  
3 information, so the IP address is useless to us; and, two, the  
4 IP addresses that plaintiff has provided are his current IP  
5 addresses. They don't match the IP addresses from the two  
6 submissions. So, clearly, his IP addresses have changed over  
7 time because it's very easy, anyone can change your IP address  
8 at any moment. So that doesn't help us.

9 It's also possible, some people do this, especially  
10 people who file repeat TCPA lawsuits, that you submit different  
11 information because you're testing out the lawsuit or whatever.  
12 Again, we wouldn't know that. So the only place that would  
13 exist would be on his devices.

14 Now, he also says we might be able to have this  
15 information through the Jornaya reports. I don't know if your  
16 Honor is familiar with Jornaya reports. I'm happy to explain  
17 them.

18 THE COURT: Go ahead. I have some familiarity, but  
19 not like you do. So, please.

20 MR. TAYMAN: Sure. They're a technology provider  
21 that groups specifically out of the tidal wave of TCPA  
22 litigation that companies were facing in these massive  
23 pressures of class actions. So they offer this technology that  
24 you can enter a code on your website and it'll capture a  
25 consumer's visit, you see what the consumer types into certain

1 fields, and if they submit -- they press the submission button,  
2 then you get a -- you get a replay and a report of that. So  
3 you can see what information the person put in and what pages  
4 went in.

5 What you don't see are mouse movements. So you  
6 won't know that. And you only know that someone clicked on a  
7 button because the page will change to the next flow.

8 And, importantly, the Jornaya only captures pages  
9 where the code is on that page. LMB does not put the code on  
10 its terms of use or privacy policy. And for this point and the  
11 point I made before, your Honor, we could happily provide you  
12 with a declaration from LMB if we need to, but point being if  
13 Mr. Daschbach, you know, visited this website in multiple times  
14 before or after these visits -- and, you know, we'll get into  
15 some other facts that I think are very interesting and suggest  
16 that we need to get this inspection to find that out -- LMB  
17 wouldn't know that and Jornaya wouldn't capture it.

18 And if you clicked on the terms of use, which is  
19 where the arbitration provision was that we previously  
20 litigated before you, and he had actual notice, the Jornaya  
21 wouldn't capture that as well.

22 So we think there's no other source of information  
23 except from his devices, which is why we need the inspection in  
24 particular to the extent he's going to continue to dispute that  
25 he consented, which is his position in the litigation.

1                   THE COURT: Yeah, it is. All right. I had a couple  
2 things that raise questions in my mind, but let me let  
3 plaintiff's counsel respond to what you just said.

4                   I mean, do you not -- he's basically saying that --  
5 that LMB and that what is it Joe -- the --

6                   MR. TAYMAN: Jornaya.

7                   THE COURT: The Jornaya, yeah, that neither of those  
8 provide him the information he needs. Do you not accept that?

9                   MR. SMITH: I do not accept that, your Honor. What  
10 he actually just said is where they go through the submission  
11 process and click submit, it does record a lot of that  
12 information. He did say that at the beginning there.

13                  For both of the visits at issue in this case, he  
14 went through and pressed submit, so LMB would have recorded the  
15 number of clicks on the site, the date and time stamps, the web  
16 pages he visited -- let me look here -- the IP address and the  
17 LMB web -- the website also discloses that they record the IP  
18 address for each visit, right?

19                  So they have all that information when they went  
20 through the submission process for both of those visits.  
21 Right?

22                  They also disclosed that they used the Jornaya  
23 visual playback which would show an exact visual representation  
24 of going through the process.

25                  Now, if he navigated away from that page, there

1       wouldn't be a visual -- there would be a record of -- a break  
2       in the visual playback, but that's not present here and they  
3       haven't provided any foundation for their support that it is.

4                 And I would note that every Internet website,  
5       including the subject website, records IP addresses for  
6       Internet traffic that goes to the site, including for each  
7       page. They have the IP addresses for the subject dates and the  
8       subject time period, yet they've been unable to make any  
9       showing that that same IP visited on any other occasion.

10               The standard isn't that there might be information  
11       available. Rocket Mortgage has to substantiate each request  
12       that there will be information produced. And it's a steep hill  
13       to climb because it's an extraordinary remedy to access a party  
14       opponent's device. They haven't substantiated their demand  
15       that any other visits to the website were ever taking place.

16               They haven't deposed Mr. Daschbach, they haven't  
17       issued subpoenas to their Internet providers to see if there  
18       were other visits to the website. They're purely speculating  
19       that there are any other visits to the website.

20               And I'd also note that they say the Jornaya Visual  
21       Playback won't record the movements or the -- you know, where  
22       it's viewed in the website. Well, I've been involved in a  
23       number of these forensic examinations. Our firm has. We've  
24       never heard defense counsel argue and we've never received an  
25       expert opine that through a forensic examination you can tell

1 where a mouse was on a page --

2 THE COURT: Yeah.

3 MR. SMITH: -- or where it was viewed. Right?

4 They're not going to get that regardless. That's not our  
5 burden to disprove; that's their burden to prove that they can  
6 get that information.

7 So there's plenty of information that they could lay  
8 a foundation, but they haven't laid any foundation for other  
9 visits, other visits to similar website, whatever that means,  
10 it's not entirely clear, or they haven't provided a single fact  
11 to suggest that Mr. --

12 THE COURT: What -- what that means is whether your  
13 client -- you know, let's just cut through it. It's whether  
14 your client's a professional plaintiff on these types of cases.  
15 He's trying to find out, you know, and you -- what are you  
16 shaking your head about?

17 MR. SMITH: That's not a defense. There's a  
18 standing defense, but the professional plaintiff argument is  
19 not a defense to a TCPA --

20 THE COURT: Well, it's not a -- it's not a defense,  
21 but it goes to the issues that they have to prove in their  
22 defense. That's -- you know, I know it's not a defense. But  
23 it's -- that's -- it seems to me to be discoverable. But --

24 MR. TAYMAN: Your Honor --

25 THE COURT: Go ahead. Go ahead.

1 MR. TAYMAN: May I --

2 MR. SMITH: Sorry.

3 THE COURT: Wait, wait. One at a time.

4 Go ahead, plaintiff.

5 MR. SMITH: Okay. I just want to point out perhaps  
6 they could seek discoverable information in the form of  
7 discovery or documents, but they shouldn't be entitled to a  
8 forensic examination based on a hunch that he may be setting up  
9 lawsuits. They have to establish facts that he's, in fact,  
10 done so before they get to intrude on a party opponent's  
11 electronic devices and they haven't produced anything with  
12 regard to that fact.

13 MR. TAYMAN: Your Honor, if I may respond there.

14 THE COURT: Yes.

15 MR. TAYMAN: A few things.

16 Mr. Taylor -- Mr. Smith says every -- every Internet  
17 provider, every website address, has a list of all IP  
18 addresses. I don't know where that's coming from. That is not  
19 the way LMB works. Again, happy to substantiate that by  
20 declaration.

21 He's very focused on the two submissions. The  
22 problem is his client is denying consent. So, your Honor, if  
23 we just go back to some facts, last time we saw you, you said  
24 you were interested in some of the facts here.

25 A couple of things. He goes to the website the

1 first time on September 13th, 2021. He submits his  
2 information. Rocket Mortgage calls him that day and says,  
3 we're calling about your refinance information requested. He  
4 says, can you send me an email. Rocket Mortgage says, well,  
5 how about if I have someone call you back. He says okay.

6 We call him the very next day, same conversation;  
7 can you send me an email. He says that a couple times. The  
8 person says okay. That very day we send him the email. We  
9 have that email from plaintiff's production.

10 Attached to the top of an email is a redaction  
11 because he sent it to his attorneys the very same day after he  
12 made the submission. So he was already contemplating this  
13 litigation.

14 And I'll get to -- you know, that's irrelevant, but  
15 I think the core issue is still on his consent.

16 There's a call the next day, September 15th. He  
17 says, don't call me again. Rocket Mortgage puts him on its  
18 opt-out list, doesn't call him again.

19 He then comes back in December of 2021,  
20 December 20th, and consents again. These are all the facts we  
21 laid out in the arbitration.

22 Now, here are the facts as to the lawsuit. He first  
23 files this suit saying these calls resulted from him being to  
24 FedRateWatch.org website. We send him a letter and saying we  
25 have no evidence of that, we have evidence twice you consented

1 which forecloses your claims as a matter of law.

2 Instead of engaging with us, he files an amended  
3 complaint where he stays completely silent about going to the  
4 website at issue, the refinance.enhancedrefinow, except he  
5 includes in it three places in three of his six class  
6 definitions.

7 When he opposes the motion to dismiss and the motion  
8 to compel arbitration, he says, I don't recall going to that  
9 website at all.

10 So those were the facts the last time we saw you.

11 We meet and confer in May on this issue of the  
12 inspection and he says, well, you don't need it because I'm not  
13 going to dispute that I went to the website.

14 Our response was simple: Is he going to contest  
15 that he consented. Right? If we get to a jury, we're  
16 entitled -- we are going to have to prove that he consented.

17 He says, yes, he's going to contest that. He's not  
18 going to agree that he's consented.

19 So those were -- that was the facts as we understood  
20 them up to two days ago when in his submission to your Honor he  
21 says he's going to admit that he went to these websites.

22 It can't be the case that we have to go get  
23 discovery from him through a deposition, we have to go to his  
24 third-party Internet providers to figure out what he did  
25 because his story's constantly changing from I'm not going to

1 say anything about the website, I think it was a different  
2 website, I don't recall, I'm not going to contest it, to now  
3 I'm going to admit I did it.

4 So when we get to trial, if we ever get to a trial  
5 of his claims, we're entitled to show a jury not just that he  
6 admits he did it, but the proof that he did it; that if there's  
7 evidence that he went to the website on other dates and times  
8 and was searching around it, was aware of the terms; if he went  
9 to other mortgage websites so he understood and knew that if he  
10 puts his information out there, the result is I'm going to get  
11 calls.

12 That's highly relevant evidence that a jury's  
13 entitled to hear and there are -- in his responses to our  
14 discovery request, he has told us he does not have records of  
15 his Internet history that he can produce.

16 So an inspection may reveal it. It may not. So  
17 we are willing to engage a forensic examination. We have  
18 addressed all his concerns through the protocol we submitted to  
19 your Honor. It searches five categories of information, just  
20 five different buckets. It is not an all-encompassing search,  
21 like plaintiff says. It is not a multiyear search. It is  
22 limited to a four-month period.

23 It provides plaintiff the opportunity to review the  
24 results, to identify anything that's privileged, redact  
25 anything, provide us a log, and then we will provide -- give it

1 to us and we even provided the instruction protocol so that any  
2 concerns about, you know, his other Internet activities, it's  
3 all protected.

4 There's a protective order in this case. It'll --  
5 you know, whatever else he went out there, is not going to get  
6 out there. But we are entitled to know if -- if he's going to  
7 contest consent, because it -- quite frankly, unless there's an  
8 admission, I don't know how this case goes forward on either of  
9 his -- any of his claims known as a class case. But if he's  
10 going to maintain that, we're entitled to get this evidence to  
11 prove it.

12 Now, he said a few things about the standard here,  
13 your Honor. This is not an uncommon thing. He actually quotes  
14 a -- in a submission to your Honor he quoted a Sixth Circuit  
15 case that, in fact, was misquoted. He says that the Sixth  
16 Circuit said that forensic imaging of electronic devices is not  
17 common in the course of civil discovery. The actual quote is  
18 forensic imaging is not uncommon.

19 So this is very routine. There is no standard that  
20 we have to establish the evidence exists before we get the  
21 forensic imaging. He cited one case on that, the *Kalter v.*  
22 *KeyFactor* case from the Southern District of California that  
23 was *sui generis* to the holding in that case that the defendant  
24 had not made that showing because the defendant was seeking  
25 inspection on one issue alone of spoliation.

1           Again, the key issue we're going after here is  
2 consent, an issue that he is contesting.

3           Now, I do think the spoliation question is an  
4 interesting one that he raises in light of the fact that one  
5 day after the first submission, when he's already filed  
6 multiple federal civil lawsuits on the TCPA, he's in contact  
7 with his attorney.

8           And so it's also relevant, I think your Honor may  
9 recall from his other cases, Mr. Daschbach's spent his career  
10 as an attorney, so he probably knew about his obligations to  
11 preserve evidence.

12           So, you know, that -- I think we're entitled to know  
13 while we search for this consent evidence a corollary might be  
14 that it's not there anymore; there is nothing there in his  
15 Internet history.

16           And, again, I think we're entitled to know that and  
17 a jury is entitled to hear that to the extent he's going to  
18 keep disputing that he consented to these calls and  
19 communications.

20           THE COURT: So the first you heard that he was going  
21 to admit visiting the sites was when we got these discovery  
22 submissions?

23           MR. TAYMAN: Correct.

24           THE COURT: Oh, I figured that was older information  
25 between -- at least between counsel. All right.

1                   MR. SMITH: Can I respond briefly --

2                   THE COURT: Yeah.

3                   MR. SMITH: -- your Honor?

4                   THE COURT: Go ahead.

5                   MR. SMITH: So we had told them at the conferral  
6 that we did not plan to, but Rocket Mortgage delayed providing  
7 their document production for 60 days. We had asked for the  
8 information before the visit and they refused to provide them  
9 before that. So we just wanted to confirm it was his  
10 information. It was two days before we submitted or, no, one  
11 day before we submitted our submission to you that we actually  
12 received that information. And so at that point we confirmed  
13 that we would have acted. But we had already let them know --

14                  THE COURT: Wait, wait, wait. What are you saying  
15 now, like that the information refreshed his memory?

16                  MR. SMITH: Yes. Well, we didn't know what the  
17 IP -- IP address was other than what was -- we didn't know  
18 anything other than what's filed in the motion to compel. We  
19 had asked for the lead information, which is typically provided  
20 in these cases. Rocket Mortgage said, no, we're not going to  
21 provide that information.

22                  He doesn't have any of his Internet history  
23 information from his iPad because iPads delete history after  
24 30 days. So he doesn't have anything from a year and a half  
25 ago to be able to confirm that. Once we, you know, made sure

1 that it's actually his information and wasn't some, you know,  
2 information that wasn't provided that was completely  
3 inconsistent with what he -- what he would submit, then we  
4 clarified that, yeah, we're going to dispute that fact.

5 THE COURT: Hold on a second.

6 MR. SMITH: Yeah.

7 THE COURT: I'm just trying to reread your  
8 submission here where you told me -- where you told me you were  
9 prepared to admit that he visited the sites.

10 I'm trying to figure out, are you -- so, look, I'm  
11 usually frustrated in situations where the plaintiff has part  
12 of the burden of proof and the only information that it can get  
13 access to to satisfy his burden of proof is usually in the  
14 hands of the defendant. That's a very inconvenient thing  
15 sometimes, that defendants frequently drag their feet.

16 This is a situation where the defendant has the  
17 burden of proof on something and you're saying, well, they  
18 haven't made a showing. Well, they haven't made a showing  
19 because you're dribbling and drabbing the information out to  
20 them.

21 And, yeah -- yeah, you are dribbling and drabbing the  
22 information out to them. Suddenly he remembers because they  
23 gave you a bunch of -- I mean, I can't tell if you're just  
24 prepared to admit that he visited or that he remembers it now.  
25 And I just went and looked in your submission and I can't find

1 it, but it's --

2 MR. SMITH: It's point two, your Honor, the second  
3 paragraph.

4 THE COURT: Hold on a second then. Wait a minute.  
5 The second bullet?

6 MR. SMITH: Yes, it's the second bullet.

7 THE COURT: He admits doing so. Yeah.

8 MR. SMITH: Yes.

9 THE COURT: Well, that's not to say that -- I don't  
10 know. Okay.

11 MR. SMITH: Which is also what we told them during  
12 the conferrals and we asked them to serve a request for  
13 admission to that fact and we would admit that.

14 MR. TAYMAN: Your Honor, we were told they weren't  
15 in dispute and it can't be that we have to continue to propound  
16 discovery for him to avoid an inspection.

17 And on this point about the IP addresses, again, we  
18 didn't provide him -- the current IP addresses don't match what  
19 we have in our records.

20 And I appreciate he's trying to distract on to us.  
21 We never said we weren't going to give our discovery. We said  
22 we'd produce our discovery within 30 days of the entry of the  
23 protective order. We produced our discovery less than 30 days  
24 of the entry of the protective order.

25 So it's refresh of -- you know, refreshing his

1 memory and recollection, I think we're entitled to know what  
2 other evidence is there and what else is going to refresh his  
3 recollection during a deposition.

4 THE COURT: Yeah.

5 MR. TAYMAN: And we shouldn't have to take the  
6 deposition first, get it, and then come back to you and ask for  
7 him to sit again for a deposition. That's kind of backwards.

8 THE COURT: I really was thinking about ordering a  
9 deposition first, to be honest, I really was, because I  
10 thought, well, you know, if you don't get anywhere in  
11 deposition, this -- it's a little bit extraordinary to allow a  
12 device inspection. Okay? I know in these cases it does happen  
13 sometimes, but it's not something I'm, you know, eager to  
14 order, to be honest.

15 That said -- and I was thinking about I was going  
16 to -- I was going to allow you to depose him twice, if  
17 necessary, but I wanted you to depose him first to see if this  
18 was necessary.

19 But, you know, bottom line is Rocket Mortgage is  
20 entitled to discovery to support its defenses. And because  
21 these are defenses that are dispositive of, you know, most of  
22 the claims in the case or it might even -- it might even  
23 require arbitration again, you know.

24 These are important -- these are -- this is  
25 important information and I don't know how else you can get it.

1 And I don't think you should have to make a showing to get the  
2 information, especially given the track record of what's  
3 happened here.

4 So what I'm going to do is I am going to order this  
5 discovery but under the -- like under the narrowed protocol  
6 that Rocket Mortgage has -- well, that they offered in the  
7 confer that didn't -- that didn't fly. That's what I'm going  
8 to order, though. All right?

9 I'm -- you know, I just think that -- I think  
10 they're entitled to discovery and I don't think there's a  
11 better way of doing it, given -- given the situation now and  
12 what we do know and the track record leading up to here.

13 So that's going to be the ruling. I'll get a little  
14 order out to you within a couple of days here, but -- if you  
15 want it. But what it's going to say is that -- that I -- I  
16 have it here in the submission from Rocket that it's going to  
17 be along the lines of that protocol.

18 And -- and Mr. -- Mr. Smith's going to get a chance  
19 to inspect it and do a -- and claim privilege and the like or  
20 claim any kind of nondisclosure before it gets produced to  
21 defense counsel in this case. All right? So --

22 MR. SMITH: Your Honor, could I just address one  
23 point quickly?

24 THE COURT: Yes, of course.

25 MR. SMITH: So in the requested protocol, it differs

1 slightly from what they submitted in their bullet points. It  
2 appeared that they were dropping to the Court their request to  
3 inspect the device for spoliation.

4 And I would point out that courts are definitely in  
5 agreement that you don't get to inspect a party opponent's  
6 device for spoliation unless you make a foundational showing  
7 that there was relevant information destroyed and it was done  
8 so with a culpable mind.

9 So I would just ask that that portion be taken off  
10 if the Court's going to order an inspection with respect to the  
11 bullet points that were submitted to the Court. We don't think  
12 there's a basis to inspect the device for spoliation. That's  
13 my only point there.

14 THE COURT: What's your position on that, Counsel?

15 MR. TAYMAN: Yeah. Your Honor, we didn't limit the  
16 protocol in what we submitted to the Court. We submitted the  
17 full protocol. That's what we're asking for. Plaintiff had --  
18 you know, has had weeks to provide us a counterproposal to  
19 engage us on his concerns. We had to take this all  
20 affirmatively. We've engaged a forensic examiner who, if we  
21 need to, he will come to Mr. Daschbach's house, take the device  
22 for as short time as he needs for a few hours.

23 What is relevant, though, if there's nothing there  
24 and they can find that there was information there, in  
25 particular given his statements to the Court, his admissions

1 that he did not recall, I think that's highly probative of what  
2 was going on if he can't recall what was going on in this time  
3 period, in particular when we get to the deposition and ask  
4 about what are the mortgage sites he was going to, was there  
5 information, was there not.

6 THE COURT: Well, the assertion of -- the assertion  
7 of the inability to recall is important to me, it's not  
8 because -- it's not just because I'm suspicious of it. I mean,  
9 there's two ways to look at it. One is that the inability to  
10 recall these type of details could mean that there's other  
11 things he's forgotten, like other IP addresses and other things  
12 like that that are going to be -- or other conduct that's going  
13 to be important information in the case.

14 That's a -- and that's if the assertion of a failure  
15 to recall is a truthful one. Right? It -- it casts -- it  
16 casts, you know, his recollection into doubt and that requires  
17 more digging and, of course, if it's not a truthful assertion,  
18 that's another problem. But either way, I think it supports  
19 the order for discovery.

20 But I'm not -- I guess I didn't understand your  
21 point, Counsel, when it comes to -- how does that respond to  
22 Mr. Smith's argument about spoliation?

23 MR. TAYMAN: Your Honor --

24 THE COURT: Go ahead.

25 MR. TAYMAN: Sure. This issue here is preservation,

1 your Honor. Right? And the device will show that. If it's  
2 the case that his device settings -- you know, everyone can  
3 address their iPad differently, but if his case was it was --  
4 his device settings were set up to clear history in 30 days,  
5 that's fine. We're entitled to know that.

6 Whether or not we make a spoliation issue --  
7 argument, that's an issue for later. But if we can't get the  
8 evidence in the first place to understand if there's history  
9 there or not, and if there's not why not, then we're not even  
10 able to explore that, whether it was something that under his  
11 obligations when he was in active litigation in other lawsuits  
12 and when he was communicating with his counsel one day after  
13 the submission, you know, what he did and what his duties were  
14 and what his obligations were.

15 THE COURT: Okay. Okay. I get it. All right.

16 Anybody else want to say anything else before we  
17 wrap up?

18 MR. TAYMAN: Nothing from Rocket Mortgage, your  
19 Honor.

20 THE COURT: All right.

21 Mr. Smith, anything?

22 MR. SMITH: No, your Honor.

23 THE COURT: All right.

24 Nick -- anything, you know, I haven't covered you  
25 wanted me to cover, Nick?

1                   THE LAW CLERK: (Shakes head.)

2                   THE COURT: Okay. Okay then.

3                   Look for an order shortly. I appreciate your  
4 submissions here and we'll get a -- an order out to you, you  
5 know -- well, I want to say early next week, but with the  
6 holiday it might intervene. But you know what's coming, so you  
7 may as well start getting ready. Okay?

8                   MR. TAYMAN: Thank you, your Honor.

9                   MR. SMITH: Thank you.

10                  THE COURT: All right, Counsel.

11                  Hey, can -- can -- can Nick and Evan stay on the  
12 Zoom call with me for a first minutes here? You guys can --  
13 counsel can exit.

14                  MR. TAYMAN: Thank you.

15                  (Proceedings concluded at 11:37 a.m.)

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C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 7/28/23

/s/ Liza W. Dubois  
LIZA W. DUBOIS, RMR, CRR